No. 12299

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants.

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross Appellees,

vs.

LEO LEBENBAUM,

Cross Appellant and Appellee.

Opening Brief on Behalf of Appellant and Cross Appellee Paul Gawzner and Irene Gawzner.

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Jurisdiction.

The jurisdiction of this Court is invoked under Section 1291 of the *New* Judicial Code. The original suit is an action in eminent domain brought by the United States of America against the appellants and cross appellees Paul Gawzner and Irene Gawzner and appellee and cross appellant Leo Lebenbaum of which the District Court had jurisdiction under Section 24(1) of the Judicial Code as amended (28 U. S. C. A. Section 41(1)) and under 40 U. S. C. A. Section 257 (now Sections 1358 and 1403 of *New* Judicial Code).

The Third Amended Complaint in Condemnation, upon which the original suit went to trial, was filed October 23, 1946, under the authority and pursuant to the provisions of an Act of Congress approved August 18, 1890 (26 Stat. 316) as amended, by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; U. S. C. Paragraph 117) and the Act commonly known as the Second War Powers Act, being Act of Congress approved March 27, 1942 (Public Law 507—77th Congress [R. 36 to 44].*

Judgment and Decree in Condemnation fixing the amount of just compensation to be paid by the United States was entered November 26, 1946, the Court retaining jurisdiction to determine the distribution of said award between Gawzners and Lebenbaum, who were the only interested parties in said award [R. 53 to 59]. Funds in payment of said judgment were deposited by plaintiff in the Registry of the Court [R. 264-265]. The issues between these parties were framed by the answer to the Third Amended Complaint of plaintiff and Cross-Complaint against Lebenbaum filed by Gawzners [R. 72-86] and Answer of Lebenhaum to the Second Amended Complaint [R. 87-98], which by stipulation and order of the Court was to stand as the Answer to the Third Amended Complaint [R. 263].

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*Throughout this brief defendants below and appellants and cross-appellees in this Court Paul Gawzner and Irene Gawzner will be referred to as "Gawzners" and defendant below and appellee and cross-appellant in this Court Leo Lebenbaum will be referred to as "Lebenbaum." Wherever necessary to refer to plaintiff it will be referred to as "United States."

Reference to the Transcript of Record will be made by referring to said Record by the letter "R," followed by the number of the page referred to.

All emphasis ours unless otherwise noted.

Final judgment of the District Court upon Distribution of the Award Provided for by Judgment and Decree in Condemnation, which adjudicated the rights of these appellants and cross appellant in and to said award and ordering distribution of the funds remaining in the Registry of the Court was entered on April 15, 1949 [R. 237-239]. Notice of Appeal, on behalf of Gawzners, was filed April 28, 1949 [R. 240]. Supersedeas and Cost Bond was filed by Gawzners May 5, 1949 [R. 241-244].

Concise Abstract of Case and Questions Involved.

This action was brought by the United States to condemn the temporary use of a completely furnished and equipped resort hotel entirely owned by Gawzners [R. 354] but leased to Lebenbaum for a period commencing before and extending beyond the term of taking [R. 275]. The lease was for the sole use as a resort hotel [R. 281], the rental was based upon a percentage of gross business of room rental and food and liquor sales, with a minimum guarantee [R. 281]. The lessee was to repair and maintain the hotel and grounds (except the exterior of buildings) [R. 285] and in addition was to maintain the furniture and equipment in the same condition as at the commencement of the lease [R. 287-290].

The lease also provided in part [R. 291]—"In the event the State of California or the County of Santa Barbara or *any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose,* the amount of the award in any such condemnation suit shall belong solely to the lessors. . . . Further in this connection, should the effect of such condemnation be such as to reduce the

rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days written notice to the other" [R. 291-292].

After the taking Gawzners gave notice of cancellation of the lease [R. 305 and 354]. Gawzners were not paid for use of the premises during the taking by either Lebenbaum or the United States [R. 422] except as awarded a portion of the compensation in these proceedings. The United States did not restore the premises. After possession of the premises was returned to Lebenbaum, pursuant to order of the Court, Lebenbaum made only limited restoration of the premises.

The Decree in Condemnation made pursuant to stipulation of all parties fixed the sum of $205,000 as compensation for the *taking* and *failure to restore* the premises without apportioning the same [R. 55]. Thereafter the rights of Gawzners and Lebenbaum to the award were litigated. During such trial it was stipulated that $91,296 of the total award should be allocated to restoration [R. 356], of which by a subsequent stipulation $10,500 was paid to Lebenbaum in repayment for restoration done by him and $80,796 was paid to Gawzners [R. 98] and Gawzners completed the restoration of all of the property and the repair and replacement of furniture and equipment.

The balance of the compensation in the sum of $113,704 was claimed by the Gawzners, *first,* because the lease had been canceled by the institution of the within pro-

ceedings and the giving of notice of cancellation pursuant to the condemnation clause above set forth; *second,* because the condemnation clause required the payment to Gawzners of the entire condemnation award even though the lease was not cancelled; and, *third,* that the remainder of said award constituted the reasonable value of the use of said premises and there was no bonus or market value in the lease and, accordingly, Gawzners, as the owners, were entitled to such reasonable value, there having been no property taken from Lebenbaum and he having suffered no compensable loss. Gawzners introduced expert testimony that the lease had no market value. Lebenbaum, on the other hand, claimed the entire balance on the theory that the leasehold interest only was taken and he was obligated to pay Gawzners rental during the period of taking, though the amount thereof was not specified and he had not paid Gawzners rent or other compensation during the occupancy of the United States. Lebenbaum also claimed he was entitled to a portion of the award based upon a division thereof on the ratio of past or prospective rental to Gawzners and profits to Lebenbaum [R. 463, 464]. Lebenbaum offered no testimony as to the bonus or market value of the lease [R. 434 and 443] but tendered in evidence through a hotel accountant a balance sheet and profit and loss statement for the period of his lease prior to the taking by the United States [R. 310 and 432] and a hypothetical profit and loss statement based upon prospective operations of the

hotel during the occupancy by the United States [R. 324 and 450]. Both these statements were received by the Court over objections of Gawzners and apparently constitute the basis of the Court's division of the award [R. 483 and 233]. The balance of the compensation was awarded by the Court as follows: To Gawzners $69,344 (which included use of property not covered by the lease) and to Lebenbaum $44,360, purportedly as a just and equitable distribution [R. 235 and 238].

The questions involved in this appeal are:

1. Did not the District Court err in holding that the condemnation clause did not apply to the case at bar?

   a. To effect a cancellation of the lease upon the giving of notice by Gawzners.

   b. To require the payment of the award solely to Gawzners even if it did not effect a cancellation of the lease."

2. Even if the condemnation clause did not apply to the case at bar, did not the District Court err in awarding Lebenbaum $44,360, or any other sum, from the balance of said award for the following reasons:

   a. The Court failed to award Gawzners the reasonable value of the use of the premises covered by the lease.

   b. The Court ignored the undisputed testimony that the lease had no market or bonus value.

c. The Court permitted the introduction of testimony as to past and prospective profits of Lebenbaum.

d. The award to Lebenbaum of $44,360 must have been predicated on such erroneous testimony of past and prospective profits. There is no other evidence to support the award.

e. The award of $44,360 to Lebenbaum must have been for loss of business and prospective profits. There was no evidence as to market or bonus value of the lease nor evidence of any other damage or loss sustained by Lebenbaum.

f. The Court failed to award Gawzners the reasonable value of the use of the property not covered by the lease though the testimony was undisputed. The Court apparently reduced the amount found to be the market value by some undisclosed method.

g. The Court misinterpreted the stipulation of the parties as to the amount allocated to restoration and permitted such misinterpretation to affect the award of the balance of compensation.

h. The award of $69,344 to Gawzners (including the value of the use of the property not covered by the lease) and $44,360 to Lebenbaum is predicated on some ratio of rental payable for the use of the property condemned and prospective profits of Lebenbaum.

Specification of Errors.

1. The Court erred in finding and concluding that the lease between Gawzners and Lebenbaum was not cancelled by the institution of the within proceedings and the giving of Notice of Cancellation by Gawzners to Lebenbaum pursuant to the provisions of said lease and particularly Paragraph Ten thereof, in that such determination is contrary to the terms of said lease and the intent of the parties thereto.

2. The Court erred in finding and concluding that Gawzners were not entitled to the entire award pursuant to Paragraph Ten of said lease even if said lease was not cancelled, in that such determination is contrary to the terms of said lease.

3. The Court erred in ordering possession of the hotel portion of the premises returned to Lebenbaum upon termination of the term taken by the United States for the reason that the institution of the within suit and the giving of the Notice of Cancellation cancelled said lease and possession should have been returned to Gawzners.

4. The Court erred in finding and concluding that a just and equitable division of the award for the use of said premises (after deducting the amount allocated for restoration) was as follows: To Gawzners $69,344; To Lebenbaum $44,360, in that:

a. Said lease had been cancelled as set forth in specification 1 above.

b. The lease required all condemnation awards to be paid Gawzners as set forth in specification 2 above.

c. Such finding and conclusion in favor of Lebenbaum is not supported by any competent evidence.

d. Such finding and conclusion in favor of Lebenbaum is contrary to the undisputed evidence that the lease had no market or bonus value at the date of taking.

e. Such finding and conclusion fails to award to Gawzners, as owners of the only property the use of which was acquired by the United States, the reasonable value of such use or the reasonable rental value of said property as shown by the undisputed evidence.

f. Such finding and conclusion in favor of Lebenbaum was for his loss of business and prospective profits, consequently a distribution to him, from the award, of compensation not recovered or recoverable from the United States.

g. Such finding and conclusion was made on some ratio based upon the rental or use value of the property taken, owned by Gawzners, and prospective profits of Lebenbaum, consequently an improper method of distribution of a condemnation award.

h. Such finding and conclusion is not supported by any competent evidence.

5. The Court erred in holding in Finding 17 that here was no evidence as to whether or not a portion of he fund remaining for division, after the allocation of

$91,296 for restoration, was to include compensation for the time necessary for restoration in that such finding is contrary to the stipulation of the parties concerning such restoration.

6. The Court erred in holding in Finding 18 that there was no evidence whereby the Court could make a finding as to excess wear and tear or excess costs of restoration in that such finding is contrary to the stipulation of the parties since all issues as to restoration were settled by such stipulation.

7. The Court erred in holding in Finding 19 that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to Gawzners or Lebenbaum in that such finding is contrary to the stipulation of the parties settling the division of the restoration fund.

8. The Court erred in holding in Finding 19 that as to some items, restoration was made to an extent beyond that necessary to restore to the same condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the United States, in that such finding is contrary to the stipulation that the sum of $91,296 was the amount necessary for restoration and such finding is contrary to the evidence.

9. The Court erred in holding in Finding 19 that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the

lease in that such finding is contrary to the stipulation of the parties settling all divisions of the restoration fund.

10. The Court erred in holding in Finding 22 that the sum of $113,704 does not represent a sum which can be found to be the compensation for the use of the premises because the total judgment of $205,000 had been depleted by an excess amount for restoration, in that such finding is contrary to the evidence and contrary to the stipulation of the parties.

11. The Court erred in considering in Finding 27 the profits which Lebenbaum, as lessee, received or might receive from the operation of the hotel business and the ratio of those profits to rental for the premises in that the loss of prospective profits from the operation of a business are not compensable in a condemnation action.

12. The Court erred in making Finding 28 in that such finding is contrary to the undisputed evidence.

13. The Court erred in admitting in evidence Lebenbaum's Exhibit A [R. 310-323, and 432], which is the financial statement of Lebenbaum showing a balance sheet as of October 1, 1944, and a profit and loss statement for the period of January 1 to July 15, 1944 with supporting schedules. This exhibit was admitted on direct testimony on behalf of Lebenbaum over objection of Gawzners that it was incompetent, irrelevant and immaterial, not proper direct evidence, did not tend to prove or disprove the issues in the case, *i. e.,* the market value of the leasehold interest; it has a tendency to establish the profits, which

the courts have held to be an improper basis for evaluation of property in condemnation proceedings; it calls for speculative and conjectural testimony, *i. e.,* the profits made from the operation of a business; and is improper on direct examination [R. 432].

The Court erred in refusing to strike said Exhibit A upon motion of Gawzners made upon the same grounds as stated in the objection to receiving the exhibit in evidence [R. 433]. [Ruling appears R. 187.]

14. The Court erred in admitting in evidence Lebenbaum's Exhibit B [R. 324-331 and 450] which is an *estimated* profit and loss statement based upon the *assumed* operation of the hotel during the first year of the occupancy by the United States calculated in part from Lebenbaum's past experience, in part from national averages and adjusted to results achieved in other hotels [R. 324 and 450]. This exhibit was admitted on direct testimony on behalf of Lebenbaum over objection of Gawzners that it was incompetent, irrelevant and immaterial, that it was conjectural and speculative and an attempt to prove future profits in a condemnation proceeding and that no portion of the award made in the action between the United States and the defendants included an item of estimated profits [R. 450].

The Court erred in refusing to strike said Exhibit B upon motions of Gawzners made upon the ground that it was an attempt to recover out of a condemnation proceeding by anticipating profits that might have been made [R. 463] and upon the ground the witness conceded the report to be speculative [R. 468-469] and upon the renewed grounds that it was speculative, an attempt to show profits, conjectural, and improper evidence in a con-

demnation proceeding or in any apportionment of an award rendered in a condemnation proceeding [R. 473] [Ruling appears R. 187].

15. The Court erred in admitting in evidence and in failing to strike the testimony of the witness Lloyd S. Pettegrew, produced by Lebenbaum, relating to past and prospective profits of the operation of said hotel as shown by said Exhibits A and B. The objections and motions to strike were made on behalf of Gawzners on the same grounds as made to said Exhibits A and B.

16. The Court erred in refusing Gawzners permission to file Paragraphs IV, V, XX and XXI of their Cross-Complaint and Exhibit B attached thereto in that Gawzners were unable to produce evidence as to matters occurring subsequent to the date of surrender of the premises and thus have adjudicated matters growing out of this litigation.

17. The Court erred in not signing the Findings of Fact proposed by Gawzners in that said Findings of Fact were in accord with the evidence.

Summary of the Argument.

1. It is contended the Court erred as a matter of law in concluding [Conclusion 2, R. 234] that the lease between Gawzners and Lebenbaum was not cancelled by the institution of the within proceedings and the giving of Notice of Cancellation by Gawzners to Lebenbaum. The Court found the existence of the condemnation clause in the lease [Finding 5, R. 218] that the United States took possession of the entire property pursuant to the within condemnation proceedings [Finding 6, R. 219] and that the Gawzners gave Notice of Cancellation under the terms

of said condemnation clause [Finding 8, R. 220]. No contention was made that the language of said condemnation clause was ambiguous, nor was any tesetimony introduced attempting to explain or vary the terms thereof. We contend the Court ignored the plain language of said clause in holding that the same did not apply to the within action. We contend that such holding is contrary to the express language of the lease and contrary to the intent of the parties as expressed in that lease.

2. We contend that the Court erred as a matter of law in concluding the Gawzners were not entitled to the payment of the entire award in the within proceedings [Conclusion 4, R. 235], in that such conclusion is contrary to the express language of the condemnation clause of the lease and the Court erred in determining that such clause was not applicable to the within proceedings.

3. We contend that the Court erred in concluding [Conclusion 7, R. 235] that a just and equitable division of the remainder of the award (after deduction of the agreed costs of restoration) was $69,344 to Gawzners and $44,360 to Lebenbaum. Such contention is fundamentally based upon the alleged error of the Court in permitting Lebenbaum to introduce evidence of past and prospective profits and then using such erroneous testimony as a basis for the Court's purportedly equitable distribution of the award, *i. e.*, in the words of the Court [R. 486] ". . . the Court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each would have received had the

hotel been operated during those years under the lease." Inherent in this argument are the specific alleged errors of introduction of testimony; alleged disregard of settled rules of law that a defendant may recover only for damage which he sustains, which does not include loss of prospective profits or loss to business; alleged disregard of settled rules that a tenant may only recover bonus or market value of a lease when he has not paid the rent reserved in the lease or the reasonable value of the use of the premises during the period of taking; alleged disregard of undisputed testimony that the lease had no such bonus or market value; alleged misinterpretation of the stipulation in reference to restoration; findings in reference to such restoration alleged to be without support in or contrary to the evidence; that such division did not give just compensation to Gawzners while giving Lebenbaum a portion of the award for a non-compensable loss, *i. e.,* for loss of prospective profits, for which no recovery was had from the United States; and that there was no competent evidence to sustain the award made by the Court.

Before commencing our arguments we submit that the abstract of the case and questions involved, hereinbefore set out, present the only material matters and issues of this case. We concede there were many side issues and ramifications. It is submitted that such matters only confuse the main issues. To even state them in this brief would extend it beyond the permissive length. The District Court's summary of the case appearing in the Memorandum of Conclusions covers 71 pages of the record [R. 105-176].

ARGUMENT.

The District Court Erred in Holding That the Condemnation Clause Did Not Effect a Cancellation of the Lease and Require Payment of the Award to Gawzners.

There has been set out in the abstract of the case the pertinent parts of Paragraph Ten of the lease, which has been referred to herein as the "condemnation clause." The full clause appears at R. 291.

In connection with a discussion of this phase of the case it should also be kept in mind that Paragraph Two of the lease [R. 281] provides in substance that the premises shall be used solely for the purpose of carrying on the business of operating a hotel, cafe, bar and restaurant and that the same shall be continuously operated as such. Paragraph Three of the lease [R. 281] provides that the lessee shall pay as rent for the premises 35% of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges; 15% of the gross business from the sale of beer, wine and liquor; and 5% of the gross business from the sale of all food, with a provision for a minimum rental of $1500 per month. Provision is made to reduce these percentages to 30, 10 and 5, respectively, when in a calendar year the percentage rental reached the sum of $45,000 [R. 283]. The rental thus required to be paid is based almost entirely upon the gross business done. It has no relation to the profits that may or may not be obtained by the lessee. When we thus consider that the rental for the premises was dependent in a large extent upon the amount of gross business done and the lease provides that the lessee shall continuously operate the premises as a hotel, we see that the whole intent and purpose of the parties was to continuously operate the hotel

as such. We have the intent of the parties so expressed throughout the entire lease and that intent must be kept in mind in an interpretation of the condemnation clause. Not only did the lease provide that it should be operated as a hotel but that it should be so operated by the lessee.

Paragraph Twelve of the lease [R. 293] prohibited the lessee from assigning the lease or subletting the premises without the written consent of the lessor.

Paragraph Twenty-one of the lease [R. 299] gives the lessors the right to terminate the lease in the event of bankruptcy or other assignment by law.

The condemnation clause specifically provides

> "Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

Again we submit that the reading of this clause in conjunction with the entire lease, particularly the portions we have hereinabove referred to, gives substance to this portion of the clause. If fifty (50) per cent or more of the rentable rooms were affected by condemnation there would be a substantial effect upon the rental to be paid to the lessor under the terms of the lease and in all probability there would be an effect upon the operations of the lessee. In accordance with the terms of this clause Gawzners gave Lebenbaum a Notice of Cancellation [R. 305-309], which was served upon Lebenbaum on or about August 11, 1944.

18 *Am. Jur.* 866, Eminent Domain, Sec. 232, states the general rule as follows:

> "Of course, if the lease itself includes a provision in respect of the rights of the parties in the event of the condemnation of the leased premises, such provision is controlling, if applicable to the particular case. Thus, where, by its terms, an appropriation for a public use terminates the lease, the lessee is entitled to no compensation for the taking."

This rule of law has been frequently recognized by the Courts.

In *United States v. Petty Motors Company,* 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729, the Government took a temporary use. The lease of one of the tenants provided in part—

> "If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, * * * the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor * * *."

In reference to that matter the Court said:

> "The lease of the Independent Pneumatic Tool Company included a clause for its termination on the Federal Government's entry into possession of the leased property for public use. The events connected with the Government's entry just set out appear to meet the requirements for termination. * * * If the Tool Company, with its termination on condemna-

tion clause, was the only tenant and condemnation of all interests in the property was decreed, the landlord would take the entire compensation because the lessee would have no rights against the fund. * * * The Tool Company had contracted away any rights that it might otherwise have had * * * With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing."

The case of *United States v. Improved Premises, etc.*, 54 Fed. Supp. 469, was an acquisition of the use of certain premises for a term of years. The property was leased at the time of taking and the lease contained the following language:

"If the whole, or any part, of the demised premises shall be taken or condemned by any competent authority for any public or quasi public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award."

The tenant attempted to obtain compensation and in denying that right the Court said, at page 472:

"It is to be observed that the Government in this proceeding was not authorized to and does not take any of the tenant's property except possibly the unexpired term of its lease. However, here the tenant has, by the express terms of its lease, foreclosed any right on its part to receive any part of the award and

> has consented that upon the taking its lease shall cease and terminate. Matter of New York (Tri-Borough Bridge), 249 App. Div. 579, 293 N. Y. S. 223, affirmed without opinion 274 N. Y. 581, 10 N. E. (2d) 561."

It will be noted that the above decision held that the language of the lease was sufficient to cancel the same and in addition thereto that the tenant by the language of the lease had foreclosed any right to receive any portion of the award.

In *United States v. Land,* 57 Fed. Supp. 548, the clause in the lease provided:

> "If * * * said premises * * * shall be taken for street or other public use * * * this lease * * * shall terminate at the election of the lessor * * *."

The lessor gave notice of termination following the filing of a condemnation suit. The tenant appeared in the condemnation proceeding and the owner moved to dismiss the tenant's claim. The Court there said:

> "The Court is presented with this question: Does the above-mentioned provision in the lease and exercise of the right of election by Fargo to terminate the lease prevent Brown from sharing in the condemnation award?"

The Court then discusses several Massachusetts cases and stated:

> "It is apparent from what has been stated in the Goodyear case, where there was a taking of the whole premises as in the instant case, that where a lease

contains a provision similar to that in the Fargo lease and an election is made 'to terminate the lease' the right of the lessee to share in the damages is terminated by virtue of such election."

U. S. v. 21,815 Square Feet of Land, etc., 59 Fed. Supp. 219, was an action to acquire the temporary use of certain premises leased to various tenants. Each of the leases contained the following condemnation clause:

> "If the whole or any part of the demised premises shall be taken or condemned by any competent authority for any public or quasi-public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award. Current rental, however, shall in any such case be apportioned."

One tenant claimed the right to compensation for the unexpired term of its lease, and in denying that right the Court said, at page 221:

> "A condemnation clause similar to the one in the instant case, together with an alteration clause almost exactly like the one before me, were at issue, and the legal effect of these clauses was exhaustively set forth in an opinion recently handed down in the case of U. S. v. Improved Premises, known as No. 48-70 McLean Avenue in the City of Yonkers, D.C. S. D. N. Y., 54 Fed. Sup. 469. There the Government acquired the unexpired term of a tenant's lease and there, as here, the tenant claimed and sought pay-

ment for the installation of improvements for the unexpired term of its lease and for the interruption and impairment of its business. The McLean Avenue case held that by the express terms of the tenant's lease it foreclosed any right on its part of the award and consented that upon the taking of the property by the Government for use and occupancy its lease ceased and terminated. This case, as far as I can learn, has not been reviewed, but it seems to me it has all the elements of sound reasoning and logic. * * * The language of the condemnation clause is in itself all embracing and I think it included the condemnation of any property whether the fee was taken or only use and occupancy."

The Court further held in this decision that where a lease was made which included a condemnation clause the tenants knew or should have known, and are chargeable with the knowledge, that the Government and its agencies could and had the power to acquire use and occupancy, both under the First War Powers Act passed July 2, 1917, and the Second War Powers Act adopted March 27, 1942.

In the case of *Straszzula Bros. Co. v. Fargo Real Estate Trust* (C. C. A. 1st), 152 F. 2d 61, the Court held that under a condemnation clause of the lease that the tenant was not entitled to recover. That clause provided in substance that if the premises or any part thereof should be taken for a street or other public use, then the lease and the term demised should be terminated at the election of the lessor.

U. S. v. 10,620 Square Feet, etc., 62 Fed. Supp. 115.

In this case the Government was taking the temporary use of certain premises which were under leases to various tenants. Each of the leases contained a condemnation clause identical to that set forth in the case of *U. S. v. 21,815 Square Feet of Land, etc.*, 59 Fed. Supp. 219, just hereinbefore quoted. In discussing this clause the Court said at page 120:

> "The agreement is undoubtedly between and referferable to the status of the landlord with the tenant. Here the landlord claims the whole award and insists that the clause quoted conclusively determines that question. * * * the Government is only required to pay just compensation for the use and occupancy taken. The fair rental value of that use, which is what the General Motors case decides should be paid, has been stipulated at $2.00 per square foot, and none of the defendants question it. * * * Whatever claims the tenants might have are encompassed within that amount. The question really is, how shall the amount be distributed as between landlord and tenants. As between them the condemnation clause terminates the tenancies as of January 1, 1945 [the date possession was taken by the Government] and there shall be no apportionment. The tenancies were thus terminated as of that date and there was nothing belonging to claimants for the Government to take. * * * The condemnation clause cannot be limited to a taking of the fee. It specifically refers to a taking of the whole or part of 'demised premises.'

> The property taken was that of the landlord's. By the agreement the claimants' interest ceased on the taking—January 1, 1945."

U. S. v. 45,000 Square Feet of Land, etc., 62 Fed. Supp. 121, is to the same effect.

The condemnation clause in the case at bar also provides:

> "In the event the State of California or the County of Santa Barbara *or any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose,* the amount of the award *in any such condemnation suit shall belong solely to the lessors* * * *."

It is submitted that under the authority of the cases heretofore cited that in the case at bar by virtue of this language of the condemnation clause the award is payable entirely to the Gawzners regardless of whether or not the lease would be cancelled. It seems to us that it cannot be doubted that the words "any other public body" include the United States of America.

In *54 Am. Jur. 521, United States, Section 2,* it is stated:

> "In one sense the United States may be defined as a government and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment."

The above statement from American Jurisprudence is a quotation from the case of *Van Brocklin v. Anderson,* 117 U. S. 151, 29 L. Ed. 845. That the United States of America is not a person or a corporation has been recently held in the case of *United States v. Cooper Corporation,* 312 U. S. 600, 85 L. Ed. 1071. The United States must necessarily then be within the definition of the terms "any other public body." It seems inevitably to follow, therefore, that under the remaining portion of said sentence, *i.e.,* "the amount of the award in any such condemnation suit shall belong solely to the lessors," that the award in the case at bar must be paid to the defendants Gawzner. It cannot be controverted that the purpose for which the Government took possession of the property was "a public purpose" or otherwise there would have been no right to bring the action in eminent domain.

We respectfully submit that for this Court to affirm the decision of the lower Court in reference to this condemnation clause it must be determined that the United States is not a "public body" and that the condemnation was not for a "public purpose" and that the taking of the temporary use of the entire hotel and grounds was not a condemnation the effect of which was "to reduce the rentable rooms in said hotel by fifty (50) per cent," or such a condemnation as "to preclude the subsequent use of the beach forming part of the leased premises." We submit that such a decision would not be justified in view of the language of the many cases which we have heretofore cited.

The Judgment of the Court Distributing the Award Was Erroneous.

The Judgment and Decree in Condemnation, entered upon the stipulation of all parties, fixed the sum of $205,000 as compensation for the *taking of the use* of the property involved and the *failure to restore* the premises for damage done during the occupancy of the United States [R. 55]. This stipulation for judgment and the judgment were made on November 26, 1946, more than a month after the impanelment of a jury to try the main case and during which time there had been sundry contentions made, argued, and briefed and various attempts made at settlement. The settlement with the United States was for a lump sum. No attempt was made to break down the amount thereof into the reasonable value of the use of the premises or into the amount necessary for restoration. Both amounts had been the matter of dispute. By the judgment the Court retained jurisdiction to determine the amount of the interests of the Gawzners and Lebenbaum (the only persons interested in the award) [R. 58].

> "* * * The same as though a jury had rendered a verdict for said sum of $205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking * * *."

After this Judgment was entered and the award was paid into the Registry of the Court the matter came on for trial as to the distribution of the award between Gawzners and Lebenbaum. The Court denied formal motions, made upon the grounds heretofore contended for in this brief,

to distribute the award to Gawzners pursuant to the condemnation clause of the lease. It was then stipulated between the Gawzners and Lebenbaum,

> "That the portion of the award made by the Judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296" [R. 356].

This stipulation did not purport to allocate who should receive the same but it was the agreed amount to restore the premises to their condition as of July 10, 1944, including all items of ordinary wear and tear that occurred during the United States' occupancy as well as all items of restoration for damage in excess of ordinary wear and tear [R. 435]. As a result of this stipulation it is apparent that upon the restoration being done the property would be placed in the same condition it was in when the United States took possession. (Later by further stipulation this sum was paid $10,500 to Lebenbaum, and $80,796 to Gawzners, who completed the restoration.)

Having stipulated that $205,000 was the compensation for the *taking* and *restoration* and that the sum of $91,296 was the allocation for restoration, the necessary consequence was that the sum of $113,704, the remaining balance, was the *compensation for the taking* of the premises during the period of the occupancy by the United States, including land owned exclusively by Gawzners.

Here the theory of the Gawzners and the theory of Lebenbaum diverged. Gawzners contended, first, that they should be paid the reasonable value of the use of the land outside the lease. The testimony that the market value

of the use of this land was $10,950 was undisputed. [See testimony of *Allen,* R. 382 and *Frisbie,* R. 395.] Counsel for Lebenbaum conceded that the evidence was true that the value of that property was $10,950 [R. 444 and 488]. The Court found the market rental value of such areas to be $10,500. [The Court may have been under misapprehension that the witnesses testified to a sum of $10,500 instead of $10,950. See the Court's Memorandum of Conclusions at R. 160 and 162.]

Gawzners contended, second, that after deducting the value of the use of such outside land that the remaining portion of the fund would be the reasonable market rental value of the use of the hotel and the furniture, furnishings and equipment thereof; that no rent or other compensation for the use of that property during the period United States had occupied the same had been paid; that such remaining balance should therefore be distributed between Gawzners, as lessors, and Lebenbaum, as lessee, by distributing to Lebenbaum the bonus or market value of the lease, if any, and the remainder to Gawzners.

On the other hand, Lebenbaum's theory was, first, that though conceding the Court should award Gawzners the rental value for the use of the outside land [R. 375], nevertheless it should be in some amount less than the market value of such use because there was not enough money remaining, after deduction of the agreed amount of restoration, to pay Gawzners in full for this area and leave enough to pay for the rest of the property [R. 444 and 488]. Second, that after payment for the area not under lease that the remaining balance should be distributed to Lebenbaum since it was from him that the lease was taken by the United States; and, third, that if the

Court divided the award it should be upon a ratio between the rental value of the property and the profits which Lebenbaum would have made had the hotel been operated during the occupancy by the United States [R. 463, 464] contending that the bonus value theory was irrelevant [R. 393] and that the testimony of the witnesses Allen and Frisbie in reference to such bonus value was irrelevant because they failed to take into account the business operation of the property by Lebenbaum [R. 424].

In support of their theory Gawzners produced the witness Allen, who qualified as an expert [R. 365-371], and stated that he had examined the property, was familiar with the lease in question and had examined the financial reports during Lebenbaum's occupancy [R. 372-373] and then stated that in his opinion the lease had no market or bonus value [see R. 374 for the exact language of the question, R. 377 for the witness' answer] and gave his reasons for such opinion [R. 377-381].

Gawzners also produced the witness Frisbie, who qualified as an expert [R. 386-390], and stated that he had examined the property, was familiar with the lease in question and had examined the financial reports during Lebenbaum's occupancy [R. 390, 391] and then stated that in his opinion the lease had no market or bonus value [see R. 391 and 392 for the exact language of the question, R. 393 for the witness' answer] and gave his reasons for such opinion [R. 393, 394].

Lebenbaum presented no evidence of the market or bonus value of the lease in question. The witness Pettegrew, produced by Lebenbaum, was not questioned about nor did he testify to the market value of the lease in question [R. 443]. Pettegrew qualified as an accountant

[R. 425, 426] and identified Lebenbaum's Exhibit A [R. 426], the profit and loss report which was received in evidence over the objection of Gawzners [R. 432]. Counsel for Lebenbaum then stated that he had no further testimony to offer and was not going to put on any experts as to value [R. 434].

It is respectfully submitted that the Court was persuaded to these erroneous theories advanced by Lebenbaum. The Court not only received said Exhibit A in evidence, but some months later in stating that he desired further evidence in the case made the following comments [R. 438]:

> "I believe it is true that both the lessor and lessee have an interest in the property. What that interest was worth to each of them and what figure would have influenced them to consent to a sub-lease, * * * would have been determined by them, I believe, in this manner;
>
> "I believe that the Gawzners would have demanded that they receive from the new tenant the rent to which they were entitled under the lease * * *
>
> "Mr. Lebenbaum in also fixing the figure for which he would sublet the property, sublease the property, *would take into consideration how much he had earned in this enterprise and how much he was likely to earn before naming a figure.* I am not stating that in a condemnation case the profits likely to accrue can be recovered from the condemnor, *but it is my belief that such profits should be considered,* both by the seller and the buyer in arriving at a market value of the property involved." (Italics ours.)

(This method of valuation is specifically disapproved by *United States v. 26,699 Acres of Land, etc.*, 174 F. 2d 367, hereinafter discussed.)

During the same discussion the Court also stated [R. 443]:,

> "I should like to have evidence presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six months operation and try to arrive at similar figures for the period during which the property was to be subleased, to wit, the period named in the Third Amended Complaint."

And further stated that he desired each side to produce testimony as to the value of the lease taking into consideration the profits that would have been made by the lessee during the period of the United States' occupancy [R. 445].

Counsel for Gawzners respectfully declined to produce such testimony [R. 446]. Lebenbaum again produced witness Pettegrew, who presented a statement with respect to the Miramar Hotel [Lebenbaum's Exhibit B] and stated [R. 449]:

> "The report consists of an estimated profit and loss statement for the year ending July 10, 1945. It further shows a division of income as between the landlord and tenant. * * * There is a profit and loss statement. * * * In arriving at my conclusions in preparing this report I placed myself

back on July 10, 1944, and estimated or projected forward the operation for one year. This was done on the basis of past results both in the Miramar Hotel and similar hotels in Santa Barbara and other resorts in California and by the use of trends that were in vogue or were existing at that time."

Gawzners objected to the introduction of said report on the grounds set forth in Specification of Error No. 14. The witness Pettegrew was cross-examined in detail in reference to said report for the purpose of establishing that the same was conjectural and speculative and it is respectfully submitted that such cross-examination so established [R. 451-473]. In the course of said examination the witness conceded that said Exhibit B was merely a hypothesis [R. 461], that it was speculative [R. 468] and that upon the assumed operations set forth in said Exhibit B the rental that would be paid to the landlord (Gawzners) for one year would be $91,684.02 and for the 22⅔ months that the United States was in occupancy the rental would have been $173,112.80, and that under the terms of the lease a prospective purchaser would have to have paid that rental if he had done the assumed amount of business whether or not he made a cent from the operations [R. 472]. The exhibit shows that for the estimated year of July 10, 1944 to July 10, 1945, the tenant's profits would have been $84,469.93 or that the ratio between the rental and the profits of the tenant would be—rent 52.04%, tenant's profits 47.96%. In discussing the report, Exhibit

B, the following statements took place between the Court and Mr. Hearn, counsel for Lebenbaum [R. 462]:

"The Court: Then, I understand the witness is testifying as to a figure which might be used as a profit that a well-informed buyer might anticipate he could make out of the hotel during this operation, under lease, for a period of one or two years from the taking?

Mr. Hearn: Yes, your Honor. That is what I understood was your Honor's suggestion."

[R. 463] "The Court: *You were attempting to effect a division of the moneys available, based on the profits which might have been anticipated?*

Mr. Hearn: *Yes; that is true, your Honor.*

The Court: *I believe that is the same thing I had in mind* * * *. (Italics ours.)

Mr. Hearn: It is not an attempt, if your Honor please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly.

The Court: You are trying to apportion this money according to the formula worked out by this exhibit?

Mr. Hearn: That is right."

The Court again stated [R. 486]:

"The Court: I think counsel are aware of the fact that the Court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each

would have received had the hotel been operated during those years under the lease. That is my ultimate aim. I know that is contrary to your theory, Mr. Burrill.

Mr. Burrill: Yes, your Honor. I concede that it is.

The Court: How does that appeal to you, Mr. Hearn?

Mr. Hearn: If your Honor please, I will be frank to say that, if we could arrive at such a conclusion in this case and if, by that means, we could further arrive at a final judgment, and I mean a non-appealable judgment, then that would be quite satisfactory to me, but, if it does not so result, then I will reserve all rights of appeal on the theory that I have heretofore previously expressed" [R. 487].

That counsel for Lebenbaum was doubtful of the validity of a judgment based upon such division is further clearly established by his very frank statement [R. 487]:

"* * * I am very much afraid of an appeal by the defendants Gawzner from any judgment arrived at, based on testimony such as that which Mr. Pettegrew has given. And I, frankly, would have my serious doubts of the validity of such a judgment * * *."

We have gone to this length to clearly demonstrate the alleged errors of the Court and particularly to demonstrate that the District Court must have arrived at its decision based upon this erroneous testimony. It is not possible

from the Findings or the evidence, to ascertain with exactitude how the Court reached its ultimate decision. If the Court allowed to Gawzners the full market rental value of the use of the lands not covered by the lease, namely, in the amount of $10,500 [Findings 23 and 24, R. 232], the award to Gawzners for the taking of the hotel premises would be the sum of $58,844 ($69,344 minus $10,500) for the entire term of the taking by the United States, *i.e.*, 22⅔ months. This in spite of the evidence that during the six months occupancy of Lebenbaum under the lease during the slack season [R. 477], he had paid Gawzners an average of $5000 per month [R. 434]. It is seen that the Court allowed Gawzners for the 22⅔ months less than in all probability Gawzner would have received for one year of the operation of the hotel. In fact by the computations of Mr. Pettegrew in Exhibit B a tenant would have paid Gawzners $91,684.02 rental per year or the sum of $173,112.80 for the 22⅔ months. Our inability to determine how the Court made its award was apparently shared by counsel for Lebenbaum in excusing himself, in a letter to the Court, from submitting a proposed set of findings of fact and conclusions of law [R. 188]:

> "* * * I find myself unable at this time to prepare a complete set of findings and conclusions for the reason that I am unable to devise any factual basis from which a calculation can be made resulting in the precise figures of the division of the award made by Your Honor."

The Bonus Value Is the Proper Measure of the Lessee's Interest In the Award.

It is respectfully submitted that it is the fundamental and uniform law that in a condemnation proceeding a tenant recovers the market or bonus value of his lease, namely, the amount equal to the excess of the rental value over the rent reserved. This rule is particularly pertinent where the lessee has not paid the landlord any rent during the period condemned as in the case at bar.

In *United States v. Petty Motors Company,* 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729, the United States Supreme Court very clearly points out that it is the bonus value only which the tenant is to receive. In that case the government had settled directly with the landlord (p. 374; p. 732 L. Ed.). In the last paragraph of the majority opinion, the Court states the measuring rod for the value of the tenant's share in these words:

> "The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, * * * less the agreed rent which the tenant would pay for such use and occupancy."

We do not conceive that any different rule should apply in the case at bar where the entire compensation for the use of the premises has been paid into the Registry of the court pursuant to the Decree in Condemnation and the Court has retained jurisdiction to divide that award between the landlord and the tenant. In the case at bar if the rental payable by Lebenbaum to Gawzners had been a flat sum of so many dollars per month, it would be readily conceded, we believe, that after determining the amount of restoration the remainder of the compensation recovered from the United States would have been payable

first to Gawzners in the amount of such rent reserved by the lease, and the remainder, if any, to Lebenbaum as the bonus value of his lease. We submit that the rule of law is not changed because we have a percentage lease in the case at bar. The question still remains, were the percentages called for by the lease the fair market value of the rental of said premises? If the percentages called for by the lease were equal to the fair market rental value of the use of the premises, then there was no bonus value in the lease. The United States is required by law to pay nothing more than the market value or fair rental value for the use of the premises.

The same rule of law is announced in *John Hancock Mutual Life Insurance Company v. U. S.* (1946 C. C. A. 1st), 155 F. 2d 977. In that case the government condemned the temporary use of certain space in an office building. The Insurance Company occupied certain offices therein under a five year lease, which began prior to and ended after the government's occupancy. The District Court instructed the jury it could award damages to the tenant only if the fair market rental of the premises in question exceeded the rent reserved under the lease. The jury found that the tenant was not entitled to damages. The tenant appealed on the ground that it was entitled to the fair rental value undiminished by the rent it was obligated to pay under the lease. The Circuit Court, in affirming the lower Court, stated there was no evidence introduced to show whether the tenant was under continuing obligation to pay the rent but a footnote to the decision (p. 978) indicated that by arrangement between the United States and the owner the tenant was relieved of his obligation to pay rent. The Court said at page 978:

> "If, after a condemnation, a lessee remains under obligation to pay rent, it is entitled to damages equal

to the fair rental value of the leased premises. If the lessee is no longer under such obligation, then it is entitled only to the difference between the fair rental value and the rent stipulated in the lease. In harmony with this is the rule of damages laid down by the Supreme Court in United States v. Petty Motor Company, 66 S. Ct. 596, 601. There the Court said: 'The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term * * * less the agreed rent which the tenant would pay for such use and occupancy.'

"United States v. General Motors Corporation, 1945, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R., 390 cited by appellant is not in point. In that case the tenant was under a continuing obligation to pay rent and hence was entitled to the fair rental value undiminished by the rental under the lease."

In the case at bar it was proved beyond question that Gawzners have not received rental or other compensation while the United States occupied the premises and in particular that Lebenbaum did not pay such rent [R. 422, 423].

The same rule of law was approved in *Galvin v. Southern Hotel Corporation* (1947 C. C. A. 4th), 164 F. 2d 791. The temporary use of hotel premises was taken by the government. A Judgment in Condemnation was entered pursuant to agreement of the landlord and tenant, on the one hand, and the government, on the other hand, both for the use of the premises and in a separate amount for restoration. The District Court distributed the restoration fund to the landlord and divided the remainder between the landlord and tenant. The Circuit Court approved such action.

In many respects this *Galvin* case is strikingly similar to the case at bar. In addition to the method of settlement with the Government the lower Court retained jurisdiction to divide the award between the landlord and tenant as was done in the case at bar. The lease in that case was on a percentage basis of gross receipts of the tenant with a minimum guarantee. This is again in accord with the facts in this case. However, the lease in that case was made many years before the Government's occupancy so that the rental value at the time of taking was greatly in excess of the rent named in the lease and in that respect the facts differ from the case at bar. In that case the tenant first contended that the landlord should receive nothing more than the minimum rental specified in the lease and in the second place that if he was given anything more than the minimum rental it should bear a ratio to the lessee's earnings. This is similar to Lebenbaum's contentions in the case at bar. The Circuit Court disapproved of these contentions saying, at page 793:

> "Nor do we think it would be equitable, as the lessee contends, to relate the distribution of the money to the profits which, * * * he would have made if he had remained in business in 1944 and 1945. * * * The complete answer to the contention, however, is that the additional rental payable to the lessor [the percentage rental] under the lease was not based upon profits to be gained by the lessee but on a percentage of his gross receipts. * * * "

In the case at bar the percentage rental due to Gawzners was based upon a percentage of the gross business done and had no bearing upon the profits of the lessee [R. 281].

We submit the foregoing cases conclusively established that in the case at bar the Court departed from the proper measure of Lebenbaum's share in the award for the use of the premises.

The Court Erred in Admitting Evidence of Loss of Profits.

As we have heretofore seen the only testimony offered by Lebenbaum to support his contentions that he was entitled to a share of the compensation paid for the use of the premises was the introduction of his profit and loss statement for the six months prior to occupancy by the United States, being Lebenbaum's Exhibit A, and the introduction of Exhibit B, the hypothetical profit and loss statement prepared by the witness Pettegrew. Seasonable objections were made to the introduction of both of these exhibits (See Specifications of Error 13 and 14). We respectfully contend that the admission of these documents in evidence was error and contrary to the uniform and well-settled rules of law.

18 Am. Jur. 899, Eminent Domain, 259:

> "It generally has been assumed that injury to a business is not an appropriation of property for which compensation must be made. * * * Accordingly, it may be stated as a general rule that injury to business or loss of profits, * * * is not to be considered as an element of damages in eminent domain proceedings * * * "

Annotated cases 1918 B, page 878 (Note):

> "No damages can be recovered for the good will of a business interfered with by the taking of property under the right of eminent domain (citing cases)"

and again at page 879 of the same volume:

> "It is generally held that speculative or future profits of a business are not such elements of damage as may be considered in ascertaining the value of property taken under the power of eminent domain (citing cases)."

Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 67 L. Ed. 1167, 43 S. Ct. 684:

> "Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation. (Citing Cases)"

Mitchell v. United States, 267 U. S. 341, 69 L. Ed. 644, 45 S.Ct. 293:

> "The settled rules of law, however, preclude his considering in that determination consequential damages for losses to their business, or for its destruction. (Citing cases) No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land."

This general rule of law has been carried into a situation where only a temporary use is taken or leased premises. In *United States v. General Motors,* 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, the court specified certain elements that might be taken into consideration in fixing the market value that the long term tenant would charge the government as the temporary occupier of the premises and then stated:

> "Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning."

The rule is again approved by the United States Supreme Court in *United States v. Petty Motors Company, supra,* where the Court said at page 377 (p. 734, L. Ed.):

> "Since 'market value' does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings. (Citing cases)"

Counsel for Lebenbaum in offering said Exhibits A and B denied that he was attempting to recover profits as such [R. 463]:

> "Mr. Hearn: It is not an attempt, if your Honor please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly."

It is respectfully submitted that this contention of counsel is but a play upon words when the only evidence were such exhibits. No evidence was offered by Lebenbaum as to the market value of the lease. Pettegrew was not qualified as such an expert and objection was made by Gawzners to any testimony along that line [R. 462]. We submit that to offer only evidence of past and prospective profits and yet to deny that there was an attempt to recover profits is an absurdity. Even to admit such testimony as a basis for determining market value is error. That the District Court adopted these past and prospective profits as a basis for its decision or at least considered them is inherent in the decision. Otherwise there would be absolutely no evidence in the record to support a judgment in favor of Lebenbaum. In fact the sole competent

evidence is that there was no bonus value in the lease (testimony of Allen and Frisbie).

The consideration of past and prospective profits in fixing an award for a lessee's interest that has been condemned has been specifically disapproved. In *United States v. 26,699 Acres of Land, etc.* (1949 C. C. A. 5th) 174 F. 2d 367, the government was condemning certain property subject to a leasehold. In that case evidence as to anticipated profits of the lessee was permitted by the lower Court, over objection, and the Court instructed the jury:

> "Gentlemen, you would not be authorized to allow anticipated profits as such, but you may take such proof as there may be into consideration in determining the value of the unexpired leasehold at the time the property was taken by the government."

The Circuit Court held that such procedure upon the part of the District Court was error and said:

> "In the condemnation proceedings the United States did not take * * * the business of appellees, nor the services of those skilled in that business, and the Government should not be required to pay for the business experience, skill, and services, * * * of the owners when same were in no wise acquired by the condemnation proceeding. There is no obligation to pay more than such part of the fair market value of the leasehold as exceeds the annual rental."
>
> "The trial Judge deviated from the true measure of compensation—fair market value of the leasehold, if any, over and above the rental charge—and admitted testimony as to anticipated profits, and informed the jury that they could take into considera-

tion such profits for the purpose of determining the value of the unexpired lease.

"The fair market value of the unexpired portion of appellee's lease in excess, if any, of the rental charged, must be ascertained. * * * "

Incidentally, in this case the Circuit Court held that it would have been more appropriate if both the claims of the lessor and lessee had been adjudicated in the same trial. In other words, the Circuit Court there approved the procedure adopted in the case at bar and said that the lower Court should likewise have determined whether or not the lease had been cancelled by action of the parties. In this connection the Circuit Court said:

"If the lease was cancelled by appellees [lessees], no recovery ought to be had by them, or, if the lease was merely suspended because of the pendency of the condemnation proceedings, any damages to Appellees must be diminished by the annual rent which they were relieved from paying, if any."

Again we submit the cases just cited conclusively establish the error of the trial court in admitting evidence of past and prospective profits. This is true whether those profits are the direct basis of the award or whether the evidence is submitted in an attempt to recover value taking into account those prospective profits as counsel for Lebenbaum contended when urging the admission of the evidence. We submit that the cases above cited support each and every one of the grounds of Specifications of Error 4, c, d, e, f, g, and h; 11, 12, 13, 14 and 15.

The Court Misinterpreted the Stipulation for Restoration.

As heretofore stated during the course of the trial between Gawzners and Lebenbaum the parties stipulated as follows:

> "It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of $91,296" [R. 356]

and it was further stipulated that said sum would restore the premises to their condition as of July 10, 1944, including all items of ordinary wear and tear that occurred during the Government's occupancy as well as all items of restoration for damage done during the Government's possession in excess of ordinary wear and tear [R. 435]. This is the only evidence in the record in reference to such restoration except the details of the amount making up said sum of $91,296 [R. 358-362]. In spite of these facts the Court found [Finding 22 R. 231] that the sum of $113,704 (the sum remaining after deducting the amount of $91,296) did not represent the compensation paid for the use of the premises for the reason that the total sum of $205,000 had been depleted by the amount for restoration to an extent greater than that contemplated by the Stipulation for Judgment for the sum of $205,000. In that same Finding the Court admits that there is no evidence by which he can find the amount of such depletion. We respectfully submit that there was no evidence that the sum of $91,296 was not the actual amount necessary for such restoration to place the premises in the condition at the date of the taking by the government. It will be recalled that under the terms of the lease Leben-

baum was required to maintain the premises in the condition in which they were at the time he leased the same [Paragraph Seven of the Lease, R. 287-288].

We submit that the Court erred in holding in Finding 17 [R. 227] that there was no evidence as to whether or not a portion of the fund remaining for division after the allocation of $91,296 for restoration was to include compensation for the time necessary for restoration; and that the Court erred in holding in Finding 18 [R. 228] that there was no evidence whereby the Court could make a finding as to excess wear and tear or excess costs of restoration; and that the Court erred in holding in Finding 19 [R. 228] that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to Gawzners or Lebenbaum. The Stipulation of the Parties as to the disposition of the restoration fund, i.e., the sum of $91,296, after providing that $10,500 should be paid to Lebenbaum and $80,796 be paid to Gawzners subsequently provides [R. 100 and 101] that upon the payment of those funds out of the Registry of the Court both Lebenbaum and Gawzners

> "shall waive any further contentions in the above entitled action in reference to said sum of $91,296 allocated to the restoration, repair and replacement of the property condemned, both real and personal, * * *. Upon the payment of the funds out of the Registry of the Court to the parties hereto, as provided by this stipulation, this stipulation shall be conclusive between the parties hereto as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of

the parties hereto to the restoration, repair and replacement of the property condemned in said action, both real and personal, to wit, to that portion of the award in the sum of $91,296 * * *."

It is submitted that the Court in making the Findings above set forth misinterpreted the plain language of that stipulation and that there is no testimony in the record to support such findings.

It is submitted that the Court erred in holding in Finding 19 [R. 229] that as to some items restoration was made to an extent beyond that necessary to restore the same to the condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the United States. There is no evidence to support such Finding. The Finding is contrary to the express stipulation of the parties determining that the sum of $91,296 was the proper amount to be allocated to restoration.

The Court erred in holding in Finding 19 [R. 230] that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the lease. It is respectfully contended that this finding is in the face of the stipulation of the parties in reference to the distribution of the restoration fund whereby the same was to be conclusive on the parties.

The foregoing points are set forth in Specifications of Error 5, 6, 7, 8, 9 and 10.

The Court Erred in Refusing Gawzners Permission to File Paragraphs IV, V, XX and XXI of their Cross-Complaint and Exhibit B Attached Thereto.

It is conceded that if this Court awards the entire compensation to Gawzners under the contentions heretofore advanced, then the error here complained of would be moot. However, if the cause is remanded for a retrial, it is respectfully submitted that the error here complained of would be material and that the issues set forth in said Paragraphs IV, V, XX and XXI of the Cross-Complaint [R. 78 and 79] should be tried in such proceeding and that the parties should not be relegated to some other tribunal to determine these issues. That it is proper to determine whether or not the lease has been cancelled by events occurring subsequent to the return of possession of the premises by the United States has been established by the case of *Galvin v. Southern Hotel Corporation, supra.* In that action the Court held that it was proper for the District Court to declare a cancellation of the lease for failure of the tenant to comply with the covenants of the lease, subsequent to the return of possession of the premises by the United States.

Conclusion.

We respectfully submit that this Court should upon the record before it reverse the Judgment of the District Court and direct that Court to enter Judgment cancelling the lease and for defendants Paul Gawzner and Irene Gawzner for the entire amount remaining on deposit in the Registry

of the Court, namely, the sum of $110,437.75 (being the remainder of the award of $113,704 less the sum of $1594.02 withdrawn from the Registry by the defendants Gawzners and less the sum of $1672.23 paid Lebenbaum directly by the United States) and directing the Clerk to pay the same to them. The record before this Court would authorize such procedure, first, upon the provisions of the Condemnation clause of the lease and, second, upon the tacitly conceded point that without a consideration of profits Lebenbaum could claim no market or bonus value to the lease in question.

Respectfully submitted,

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